BRIEF IN SUPPORT OF PETITION.

May It Please the Court.

Foreword.

The rules established by this Court for reviewing decisions of the Court of Claims was stated in *United States* v. *Esnault-Pelterie*, 343 U. S. 26, 31, as follows:

> "We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustain able."

Also, in the same case on earlier review in 299 U. S. at page 206:

> "The special findings may not be aided by statements in the conclusion of law or the opinion of the court."[2]

Also, 28 U. S. C. 288 provides this Court may review on certiorari to the Court of Claims the question whether "an ultimate finding of findings are not sustained by the findings of evidentiary or primary facts" or "that there is a failure to make a finding on a material issue".

There is no ultimate finding that a compromise was made. All the findings are of evidentiary facts. There is no finding of any action by the Secretary of the Treasury, as required by the statute authorizing compromise. There is no finding that the case of this petitioner was ever "referred to the Department of Justice" as required to make executive

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[2] There are facts stated in the opinion of the court which are not found as a fact in the findings and of which there was no evidence. We do not object to or question the findings of fact. The court adopted them literally from the report of its Commissioner. However, the Judge writing the opinion apparently assumes the charges in the indictment were true. The presumption of law is to the contrary.

order 6166 applicable. Without these findings the plea in bar is not proved.

Point I.

The Decision Below Is in Plain Conflict With Botany Mills v. United States, 278 U. S. 282.

In the above case this Court said, at pages 288 and 289:

> "We think that Congress intended by the Statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the bureau. *When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.*" (Italics ours.)

The court then stated:

> "It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. Leach *v.* Nichols (C. C. A. 1) 23 F. (2d) 275, 277."

After this decision Congress in 1934 reenacted the Statute in identical terms and the construction given it by this Court thereby became part of it. *Hecht* v. *Malley,* 265 U. S. 144, 153, and *Burnet* v. *Hormel,* 273 U. S. 103, 108.

The Statute (Appendix, Page 18) Was Not Complied With.

There is not even a pretence that this Statute was complied with. The court below ignored it.

The defendant's plea in bar (R. 5) alleges no facts showing compliance therewith.

A reading of the findings of fact (R. 13-30) will disclose no facts or fact showing compliance therewith.

This being so, the facts found do not sustain the court's conclusion (stated in its opinion only) that a compromise was made which bars the suit.

The court below does not even cite or refer to the above quoted decision of this Court (reversing a decision of the Court of Claims) relied on by petitioner.[3]

Point II.

Executive Order 6166 Does Not Embrace This Case.

The only case embraced within this executive order (Brief, page 20) is one referred to the Department of Justice "for prosecution or defense in the courts", as a bare reading of it will disclose.

The special plea does not allege the case of this petitioner was so referred. There is no finding of fact that it was. The finding shows (finding 5, R. 13) the only case referred to the Department of Justice was that of the eight individuals who were at that time strangers to this petitioner.

The court below wholly ignored the argument and point that petitioner's case was never referred there "for prosecution in the courts" and hence the executive order was plainly inapplicable to it. It bases its decision on the assumption the executive order is applicable. Before it can be there must be a fact finding that petitioner's case was referred to the Department of Justice for prosecution or defense in the courts. There is no such finding. There is not even any such claim in the respondent's plea in bar.

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[3] It has been repeatedly followed except by the Court of Claims. *Hughson* v. *United States*, 59 F. (2d) 17 (C. C. A. 9th); *United States* v. *Royal Indemnity Co.*, 116 F. (2d) 247, 248 (C. C. A. 2nd); *Hudson*, 39 B. T. A. 1075, 1102 and even after executive order 6166, in *Brast* v. *Winding Gulf Colliery Co.*, 94 F. (2d) 179 (C. C. A. 4th).

POINT III.

An Executive Order Cannot Amend or Alter An Express Statute.

If the above two points are well take it is unnecessary to consider this one, which is that the people in the Constitution delegated the law making power to the legislative branch alone and it is non-delegable by that branch to the executive branch.

The Statute dealing with tax compromises could not be amended or altered by the executive department of the government. *Miller* v. *United States*, 294 U. S. 435, 439. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 127. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 414.

POINT IV.

Even An Otherwise Valid Compromise Made in Strict Accord With the Statute Fails for Failure of Consideration If No Tax Was Due.

The allegations of the petition showing no tax was due were never denied by any plea or put in issue. A trial on the merits and an opportunity to show no tax due was denied. For the above heading we cite: *Cloister Printing Co.* v. *United States*, 100 F. (2d) 355, (C. C. A. 2nd); *Staten Island Hygeia Co.* v. *United States*, 85 F. (2d) 68, (C. C. A. 2nd); 22 Cornell Law Quarterly, 254; 39 Columbia Law Review, 1052; *Hartsman* v. *Linton*, 27 App. D. C. 241; *Union Collection Co.* v. *Buchman*, 150 Cal. 159, 163.

POINT V.

Petitioner Compromised Nothing.

Neither petitioner nor its transferor was a party to the indictment.

"Mutual Concessions are Essential to a valid compromise." (38 Op. Atty. Gen. 94.)

Petitioner paid every penny of tax, penalty and interest claimed from it. The payment of a claim in full is no compromise. *Goodhue County Bank* v. *Ecklad*, 183 Minn. 361, 365. Of course the dismissal of the indictments, including that for conspiracy, was not a tax compromise. *United States* v. *Hirsch*, 100 U. S. 33, 34; cf. *United States* v. *Beebe* 180 U. S. 343, 351.

Point VI.

Even A Purported Compromise Contract Made in Strict Accord With the Statute Would, Under the Circumstances Here, Be Void For Duress.

In Williston on Contracts, Section 1603, page 4494, it is said:

> "Under the influence of increasing liberality of legal thought aided by the example offered by Courts of Equity in its treatment of undue influence the definition of duress in courts of law has been much enlarged. It has been said 'duress is but the extreme of undue influence'." (Citing *Commerce National Bank* v. *Wheelock*, 52 Oh. St. 534; 40 N. E. 636.)

In Williston on Contracts, Volume 5, revised edition, Section 1613, page 4510, the author notes a conflict in the earlier cases as to whether threats of criminal prosecution constitute duress and states:

> "Arguments that threats of criminal prosecution may not be duress are unsound."

The author points out the earlier cases which so held are based on obsolete ideas of what constitutes duress, such for example, that a battery cannot amount to duress unless it is so severe as to threaten life or mayhem.

The American Law Institute's Restatement of Restitution, Section 11 (c), dealing with a compromise, states:

> "Normally, however, the full payment of even a disputed claim would not be by way of compromise or with intent or agreement by the payor to assume the risk of its non-existence except when it is in response to threatened pressure."

The American Law Institute's Restatement of Contracts, Section 493 (d), page 444, also Section 495, states that if the pressure is a threat of criminal prosecution the contract may be avoided. Some of the federal cases hereinafter cited so hold.

In the case at bar the money sued for was paid to the Collector at St. Louis, Missouri and the alleged contract performed in that state. Indeed it was also made in that state for the Attorney General's acceptance varied from the offer. Thereby and because of this variance it took the status of a new offer which was accepted at St. Louis, *Drake* v. *United States*, 57 C. Cls. 535, 546, and *Iselin* v. *United States*, 60 C. Cls. 255, 261. The law of the state where a contract is made and performed governs its validity for there is no federal common law. (In making this argument we disregard the point that the federal statute prescribes the only form and manner of a tax compromise contract.)

It is held in Missouri that a threat to expose a third person to criminal prosecution, if there is a relationship between the parties, constitutes duress. *Miss. Valley Trust Co.* v. *Begley*, 298 Mo. 684, 275 S. W. 540. A note on this case in 39 Harvard Law Review 393, points out that this is generally the law. See also *International Harvester Co.* v. *Voboril*, 187 Fed. 973 (C. C. A. 8th). For federal cases defining duress see *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 239; *War* v. *Love County*, 253 U. S. 18, 23; *Wier* v. *McGrath*, 52 F. (2d) 201, 203, and cases there cited. For a case of

threatened criminal proceedings see *Henderson* v. *Plymouth Oil Co.*, 13 F. (2d) 932. Here some of the persons threatened with criminal prosecution were former officers of plaintiff and were threatened because of acts done in its behalf during the time they were its officers.

Where the issue of duress is raised the relation of the parties and all attendant circumstances must be considered. (Restatement of Contracts, Sec. 492.)

In Williston on Contracts (Revised Edition), Volume 5, Sec. 1619 A, it is said:

> "Because a taxpayer and tax collector do not stand on an equal footing with respect to bargaining power, it would be possible to hold that there is duress in any case of an illegal collection of taxes."

In this case there is vastly more than mere bargaining between the taxpayer and the tax collector. There is a positive spoken threat that if the full amount of the tax, penalties, and interest is not paid former officers of the taxpayer will be brought to trial in a strange venue hundreds of miles from home on criminal charges based on acts done while acting for the taxpayer and a promise that if the full amount claimed is paid this will not happen. If that does not constitute duress it is hard to imagine what does. In *Behl* v. *Schuett*, 104 Wis. 76, 80 N. W. 73, a compromise procured by the arrest of the defendant was held voidable for duress. We have cited above Federal cases holding the same as to any contract. It is immaterial whether the person threatened is innocent or guilty. *Miller* v. *Bryden*, 34 Mo. App. 602; *Hartford Fire Insurance Company* v. *Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Taylor* v. *James*, 106 Mass. 291; *Morrill* v. *Nightingale*, 93 Cal. 452, 28 Pac. 1068; *Clement* v. *Buckley Mercantile Co.*, 172 Mich. 243; *Landa* v. *Obert*, 78 Tex. 33. As said in *Kennedy* v. *Roberts*, 105 Iowa 521, 75 N. W. 363, our law presumes that every

man is innocent until proven guilty and this presumption must prevail.

POINT VII.

There Is No Power to Compromise Taxes Claimed to Be Due From a Solvent Taxpayer.

Congress alone may levy taxes subject to the uniformity and other constitutional requirements. When it has done so it is not to be assumed the executive branch has carte blanche to reduce them in a particular case in its discretion.

In 16 Op. Attorney General 248, it was held the statute did not give power to compromise taxes due from a solvent taxpayer. This opinion was adopted by the Treasury, S. 1371, C. B. 2, page 178. Art. 1206, Reg. 69; Art. 1205, Reg. 65; Art. 1011 of Regs. 62 and 65. Since the Attorney General's opinion was rendered in 1879 Congress repeatedly reenacted the statute and thereby adopted this construction. *United States* v. *Falls & Bro.*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos*, 209 U. S. 337, 339.

A. W. Gregg, Solicitor of Internal Revenue, testified in 1925 before the Ways & Means Committee (1925 Hearings, pages 946, 947 and 948):

> "As you know, under the existing law the Commissioner, with the approval of the Secretary, has authority to compromise taxes. The Attorney General had held that applies only to compromise of taxes due from an insolvent taxpayer."

Again:

> "The Attorney General has held and we have followed his opinion that (Sec. 3229) applies only to taxes due from an insolvent taxpayer."

The holding of the court below ignores this point which need not be considered if the court agrees with our point that no compromise is made where the full amount of tax, penalty and interest claimed is paid.

Wholly Apart From the Above Points the Offer to Pay Expressly Provided for Correction of Any Error in Computation.

The offer to pay the tax concluded (R. 17):

> "Any error in computation, either in your favor or in ours will be adjusted."

The computation of a tax involves two things: (1) the principle upon which it is computed or the application of the statute under which it is computed and the figures themselves. Cf. *Ray* v. *United States*, 301 U. S. 158, 161, and *In re Fahnstock's Estate*, 245 N. W. 899.

That is all any tax suit involves.

Conclusion.

Congress, in the statute, has prescribed the exclusive method of compromise of taxes. It was concededly not complied with. Before a case can be within executive order number 6166 it must, by the express terms of that order, be "referred to the Department of Justice for prosecution or defense in the courts". There is neither allegation nor finding petitioner's case was so referred. The reason is obvious. There was no recommendation it be indicted and procedure for tax collection is by appeal to the Board of Tax Appeals where the Treasury conducts the case.

For any one of the foregoing reasons the writ should be granted.

All of which is respectfully submitted.

BASIL O'CONNOR,
JOHN F. O'RYAN,
JOHN E. HUGHES,
Counsel for Petitioner.